IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGNAL CIVIL JURISDICTION

Arbitration Application No.209 of 2006

Engineering Projects(India) Ltd
6A, 6th floor, Bhaktawar, Nariman
Point, Mumbai 400021 through
its G.M. Shri S.R. Meshram ..Applicant

vs

1.The Chief Engineer
Maharashtra Health Systems
Development Project, Boys & Girls
Ground floor, St George's
Hospital Campus, P D Mello
Road, Mumbai 400001

2. State of Maharashtra
Notice to be served upon
The Secretary, Public Health Dept
Govt of Mah Mumbai.32

3. Kirloskar Consultants Ltd
Kirloskar Kissan Compound
13A Karve Road, Pune 411038 ...Respondents

Mr Divank Mohta with Mr. N.D. Yelkar for the applicant.
Mr K.R. Belosey for respondents.

CORAM: SWATANTER KUMAR,C.J.

JUDGMENT RESERVED ON 20.4.2007
JUDGMENT DELIVERED ON 21.6.2007

JUDGMENT:

1. The applicant is a company registered under the provisions of the Companies Act, 1956, having its registered office at 6A, 6th floor, Bhaktawar, Nariman Point, Mumbai

400021. The respondents had undertaken the World Bank Project known as “Maharashtra Health Systems Development Project” (MHSDP) and had invited tenders for construction of 100 bedded sub-district hospital at Gadhinglaj, District Kolhapur. The applicant submitted its tender, which was accepted by respondent No. 1 by his letter dated 26th June 2002. Thereafter respondent No.1 required the applicant to proceed with the work and the work order was also issued. The parties entered into an agreement which contains arbitration clause being clause 24.1 which reads as under:

> “If the Contractor believes that a decision taken by the Engineer was either outside the authority given to the Engineer by the Contractor or that the decision was wrongly taken, the decision shall be referred to the Adjudicator within 14 days of the notification of the Engineer's decision”

2 Serious disputes arose between the parties and on 24th April 2006, the applicant approached the adjudicator Shri S.R. Wadekar for adjudication of its claim as per the statement of the applicant. However, the adjudicator, on 5th May 2006, is stated to have expressed his inability to proceed with the

matter, as the respondents had failed to attend the proceedings. Again on 2nd June 2001, the applicant sent notice to the respondents to appoint arbitrator. No response was received. Again the applicant, by its letter dated 15th September 2006, requested the respondents to appoint arbitrator in terms of clause 25.3 mentioned in the contract dated 29th July 2002. All these efforts of the applicant failed to yield any results, compelling the applicant to file the present application under section 11 of the Arbitration and Conciliation Act, 1996, hereinafter referred to as “the Act”.

3. The applicant has complied with the pre-requirements under the terms of the agreement for invoking the arbitration agreement and in terms of clause 24.1, it approached the adjudicator, who, on 5th May 2006 declined to act because of the conduct of the respondents and notice was sent by the applicant for appointment of the arbitrator. Despite number of opportunities, no reply was filed on behalf of the respondents. In fact the learned counsel appearing for the respondents could not dispute that the arbitration clause has been invoked and a letter was received by them, despite which, they failed to act. The claim raised in the present application is approximately Rs. 1.21 crores. In terms of clause 25.3 (f)

where the claim is below Rs 50 millions, reference is to be made to the sole arbitrator to be appointed by the Institute of Engineers and the respondents cannot avail of the said benefit as they have failed to act and loss of right is absolute. In fact the learned counsel appearing for the respondents had no objection if any sole arbitrator from the Circular dated 13th February 2004 i.e. any former Judge of this court, is appointed as an arbitrator.

4. In view of the above facts, this application is allowed and I hereby appoint Shri Justice S.N. Variava, retired Judge of the Supreme Court as the sole arbitrator to enter upon the reference and proceed with the arbitration proceedings in accordance with law. Liberty to the parties to file their claim and/or counter claim before the learned Arbitrator. In the facts and circumstances of the case, I leave the parties to bear their own costs.

Prothonotary and Senior Master to communicate this order to the learned Arbitrator.

CHIEF JUSTICE